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Article

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John H. Jackson, Sovereignty-Modern and the Constitutional Approach to International Law

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In his own words, John H. Jackson was intrigued by frequent recourses to sovereignty in the congressional debate over the adoption of the results of the Uruguay Round of multilateral trade negotiations in 1994.[1] Concerns of politicians and lobbyists for policy space, democracy, accountability, but also an agenda for economic protectionism, all informed this debate and the recourse to a notion which had emerged in Europe after the Thirty Years War and shaped ever since the post-1648 Westphalian System of nation states. Himself a convinced multilateralist, educated in Wilsonian traditions, John did not react by discarding the notion of sovereignty as historical and outdated in modern times, as did Louis Henkin,[2] or as it was depicted by Stephan Krasner as a matter of 'organized hypocrisy'.[3] John was more cautious, recognizing national sovereignty as an important component of international law. Simply rejecting or dismantling it would bear the risk of undermining international law and thus its stabilizing functions. He identified sovereignty as one of the logical foundations of international law, and 'to discard it risks undermining international law and certain other principles of the international relations system'.[4]

John instead set out to analyse or 'decompose' the term in an analytical process typical for him: informed by the tradition of American pragmatism, empirical research, logic and reflection—and the finding and tension, as he recalled that 'all politics is local' (Tip O'Neill) and 'all economics is international' (Peter Drucker).[5] Of course, he would not stop to deal with an understanding of sovereignty as a blank

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1 John H. Jackson, 'The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results', 36 Columbia Journal of International Law 137–88 (1997), adapted in: John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000) 367.

2 Louis Henkin, *International Law, Politics and Values* (Deventer: Kluwer, 1995) 9–10; first discussed in the essay in honour of Louis Henkin, Jackson, above n 1, at 368.

3 Stephan D. Krasner, *Sovereignty, Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), referred to in John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006) 63.

4 Jackson, ibid, at 264.

5 Ibid, at 268.

check to the prince to do and leave whatever royalty pleases in capricious and arbitrary manners. The absolutist perception of sovereignty and understanding of states as black boxes was out of the question; no reasonable person could adhere any longer to this kind of understanding. Likewise, proper answers can no longer be found simply referring to consent and that national sovereignty would exclude the operation of international rules to which a state simply had not explicitly agreed to.[6] So what could and should be the function of sovereignty in contemporary and future terms?

John set out, in this process of decomposition or, as we may say in the tradition of critical legal studies and philosophical and legal deconstruction[7] (yet without referring to these schools of jurisprudence), to look into what he would come to call 'sovereignty-modern': in his careful and attempting manner, avoiding forgone conclusions and asking more questions than providing outright answers, a concept informing the proper allocation of powers among different layers of government in a vertical, but also horizontal manner emerged. Sovereignty is about allocating powers and asking whether an issue should be dealt with in Geneva, the headquarters of the WTO, the new World Trade Organization, or in Washington, or Brussels, and any other capital, or whether it should be left to sub-federal and local levels.[8] Horizontally, the question is as to who should regulate: parliament, the executive branch or the judiciary? Sovereignty-modern thus stands for the proposition of vertical and horizontal separation of powers and checks and balances. While the idea was first developed in the article already mentioned and written in honour of Louis Henkin and informed by John's participation and experience of the '1994 Great Sovereignty Debate',[9] he further elaborated the concept and notion of sovereignty-modern in his Lauterpacht lectures, printed in 2006 as a 'new approach to an outdated concept'.[10]

Upon extensive discussion of the functions of WTO law and its operation, John developed a matrix of vertical and horizontal allocation of regulatory powers. Starting with the issue (i) whether a matter should be regulated by government in the first place or rather left to markets, he defines a number of criteria and factors which may guide policy-makers in allocating such powers with a view to what we may call the production of appropriate public goods. Decisions entail (ii) defining the basis of such action and the level of governance to which the matter should be allocated. Given the structure of international and world markets, is it (iii) possible for nations to regulate the matter effectively? If not, (iv) are international organizations available suitable to make these decisions? To this effect, (v) their respective

6 Ibid, at 215–216.

7 Cf. Matti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Reissue of a new Epilogue (Cambridge: Cambridge University Press, 2005) (first published in 1989).

8 Jackson, above n 3, at 72, first expounded in John H. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept', 97 American Journal of International Law 782–802 (2002); see also John H. Jackson, 'Sovereignty: Outdated Concept or New Approaches', in Wenhua Shan, Penelope Simons, and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Oxford and Portland: Hart Publishing, 2008) 3–25.

9 Jackson, above n 1.

10 Jackson, above n 3, at 57.

constitution need to be taken into account.[11] It is a process of weighing and balancing different considerations and interests in the political or the judicial process. John wrote elsewhere: '"Sovereignty" thus is not a magical wand that one waves to ward off any entanglement in the international system. It is a policy-weighing process.'[12] Of course, these issues remain highly political and are at the core of politics, both national and international. Yet, the matrix of vertical and horizontal allocations offers a regulatory theory which is able to inform the political and judicial process. It offers an alternative to reflexes of national sovereignty, always speaking out against centralization in addressing regulatory problems, whether in a federal, regional, or global context. Vice versa, it also offers appropriate arguments for devolution and decentralization and subsidiarity, if this bears the potential of better results.

Importantly, such allocations do not stop at the level of domestic law, but sovereignty also encompasses the level of international law. The nation state no longer is the sole focus of sovereignty. Rather, John offers a framework including the level of international law and of functions assigned to the operation of treaties and international organizations within sovereignty-modern.

The cautious way, by which John developed his theory and approach, should not disguise that this took some courage in the arena of the USA and within American scholarship. It was a time after the fall of the Berlin Wall, often perceived as the end of history,[13] with a single model of market economy and predominance of neoliberal thought within the Washington consensus. The authority of international law was under pressure from US exceptionalism and trends abound to define sovereignty in terms of realism and power.[14] It is important to recall this from a post-nation state European perspective which has been much more open to new perceptions of governance and sovereignty. The evolution and development of the European Economic Communities and the European Union, but also the importance of the European Convention for the Protection of Human Rights and Fundamental Freedoms, both equipped with strong international judicial branches, offered the backbone based upon which theories of multilevel, or multilayered governance could be developed with greater expectations of acceptance. The constitutionalization of public international law, mainly promoted by European scholarship,[15] the emphasis of human rights informing international trade regulation, or advancing the doctrine of direct effect of international law was able to build upon the historical experience and leadership of the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg.[16] The experience of complete state failure

11 Ibid, at 219.

12 Jackson, above n 1, at 387.

13 Francis Fukuyama, *The End of History and the Last Man* (London: Penguin Books, 1992).

14 Cf. Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

15 See Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

16 Cf. Thomas Cottier, 'The Judge in International Economic Relations', in Mario Monti et al. (eds), *Economic Law and Justice in Times of Globalization, festschrift Carl Baudenbacher* (Baden-Baden: Nomos, 2007) 99–122.

prior and during World War II on the European Continent had fundamentally altered perceptions of sovereignty in Europe at the time.

It is remarkable how closely related John's understanding of sovereignty and the matrix of allocation of powers are to these European post-nation state perceptions, albeit without expressing the linkages in explicit terms. He certainly was exposed to these developments in Europe. John was a keen observer of European legal evolutions. His frequent discussions and visits in Brussels and contact with colleagues and former students from Europe were not without influence on his perception of sovereignty-modern. I was pleased to find much support in John's writing for my own Five Storey House approach first set out in 2003.[17]

It is interesting to observe that John's perception of sovereignty also resonates in earlier periods of European history. Long before it became part of European absolutism, the concept was developed by Jean Bodin in order to strengthen central powers of the French monarchy and to re-establish peace and order in a highly fragmented landscape.[18] It was about moving powers to the centre from the periphery and thus an issue of multilevel governance within the feudal system. Still a theoretical concept, it was suggested by French diplomats to the Swiss delegation at the Peace talks of Westphalia, and used—for the first time in diplomacy—with a view to estrange the Swiss Confederation from the Hapsburg Empire.[19] Sovereignty here served the purpose of devolving powers. Again, the move can be understood in terms of multilevel governance. Later on, the movement towards federalism in the 18th, 19th, and 20th centuries in the USA, Switzerland, Germany, Canada, and Australia and other federacies around the world reversed the trend towards centralization with a view to better cope with the challenges of that age in former common markets within the federacy.[20] It eventually turned to European integration, adding an intermediate level of governance between the nation state and public international law.

It would be wrong to assume that John developed an interest into sovereignty only following the 1994 congressional hearings and the efforts to convince the most powerful parliament of the world to sign on to agreements which in law did restrict sovereign powers in a traditional sense in an unprecedented manner, in particular with the obligation to take recourse to binding dispute settlement and the exclusion

17 Thomas Cottier and Maya Hertig, 'The Prospects of 21st Century Constitutionalism', 7 Max Planck Yearbook of United Nations Law 261–328 (2003). At the time, we failed to realize the parallels to Jackson's reconceptualization of sovereignty. On the theory of multilevel governance, see also Christian Joerges and Ernst Ullrich Petersmann (eds), *Constitutionalism, Multilevel Governance and International Economic Law* (Oxford: Hart Publishing, 2011), expounding both private and public international law theory to multilevel governance; Ernst-Ulrich Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?', in Wenhua Shan, Penelope Simons, and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Oxford and Portland: Hart Publishing, 2008) 27–60. Stephan Leibfried and Michael Zürn (eds), *Transformation of the State?* (Cambridge: Cambridge University Press, 2005).

18 Jean Bodin, *On Sovereignty: For Chapters from the Six Books of the Commonwealth*, edited and translated by Julian H. Franklin (Cambridge: Cambridge University Press, 1992).

19 See Thomas Maissen, *Schweizer Heldengeschichten: Und was dahinter steckt*, 2nd ed. (Baden: Hier und Jetzt Verlag für Kultur und Geschichte, 2015) 101 (a book challenging traditional perceptions of sovereignty based upon alleged struggles for independence and freedom).

20 See Georg Anderson (ed), *Internal Markets and Multi-Level Governance: The Experience of the European Union, Australia, Canada, Switzerland, and the United States* (Oxford: Oxford University Press, 2012).

to impose unilaterally defined standards of fairness and fair trade. While explicit and extensive discussions of sovereignty per se cannot be found in his writings, John ever since discussed important and related elements constitutionalizing international trade law. We recall his early work on the status of GATT in US law, long before direct and self-executing treaties were banned by US Congress, and subsequently the European Court of Justice in relation to WTO law.[21] We recall his discussion of standards of review and thus the proper balance of power between international review and domestic determination, in particular in the field of trade remedies. Discussing these issues referring the US Chevron doctrine of judicial review of administrative action, and working out parallels and differences, indicates a vertically comprehensive approach, leaving clear distinctions between domestic and international law realms behind.[22] Likewise, his views powerfully expressed on the binding nature of WTO, no longer at the disposition of states, reflect deep constitutional thinking.[23] He strongly supported exploring the role of human rights in the multilateral trading system and thus to role of fundamental rights originating in constitutional law.[24]

From the very beginning, John perceived the GATT as a constitutional framework. He would not refrain from understanding international organizations, including the WTO, as a constitutional framework[25] while many would prefer to limit the notion with capital 'C' to the nation state and exclusively to the realm of domestic law. In 1969, his main conclusion in *World Trade and the Law of GATT* was the call for a constitutional framework, separate from the trade rules. [26] This would eventually materialize in the WTO Marrakesh Agreement of the new international organization the name of which he suggested at the time.[27] Upon discussing the WTO and its dispute settlement, John qualified this 'in essence a "constitutional" approach to international law, using the term "constitutional" in a broad sense. He wrote that "international lawyers must 'morph' into constitutional lawyers".[28] Starting out as a professor of domestic contract law, travelling all along through contractual international law and focusing on international trade regulation, nobody else represents this shift and development of the structure of international law and its relationship to domestic law more than John himself.

21 John H. Jackson, 'The General Agreement on Tariffs and Trade in the Unites States Domestic Law', 66 Michigan Law Review 249–316 (1967), adapted in Jackson, above n 1, at 195–259.

22 John H. Jackson, 'WTO Dispute Procedures, Standards of Review, and Deference to National Governments', 90 American Journal of International Law 193–214 (1996), adapted in Jackson, above n 1, at 133–61.

23 John H. Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligations', 91 American Journal of International Law 60–64 (1997), adapted in Jackson, above n 1, at 162–67.

24 John Jackson, 'General Editor's Forword', in Thomas Cottier, Jost Pauwelyn, and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford: Oxford University Press, 2005) i–ix.

25 For example, John H. Jackson, *Restructuring the GATT System* (London: Pinter Publishers, 1990) 18 (The GATT 'Constitution').

26 John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merill, 1969) 780.

27 Jackson, above n 25, at 94. ('The basic thrust of the proposal is to have a new treaty instrument contain the organizational "constitution" for a institution which could be varioubly named, but which I will call (for simplicty's sake) a World Trade Organization.')

28 Jackson, above n 3, at 268.

In hindsight, John was right to be cautious, but courageous at the same time. Old habits die hard, and at the time of writing which in Europe witnesses its own Great Sovereignty Debate: in the wake of the debt and financial crisis and economic stagnation, in the time of enhanced influx of refugees from middle East, Africa, and Asia, traditional perceptions of sovereignty of the nation state are back in fashion, fuelled by strong national conservatives parties and the impending referendum of the UK on EU membership. Discarding sovereignty in the first place would not help. But recourse to multilevel governance, to sovereign-modern, as developed by John mainly from the angle of, and primarily addressed to, the world's leading power, will assist in keeping calm and considerate in times of tempest and crisis. Sovereignty-modern and the constitutional approach, look at domestic and international law in tandem, will enable a rational debate and finding appropriate solutions to problems which need common and joint responses beyond trade, such as climate change, migration. Together, we started to ask questions and think about addressing the role of law, of sovereignty-modern in areas largely untapped by international law: monetary affairs and financial regulations.[29] Sadly, we no longer have the privilege of having him around us in developing this novel theme to substantive international law beyond the allocation of powers. But I shall never forget how carefully he listened, how carefully he approached impending problems, without jumping to conclusions in his remarkable combination of calm American pragmatism and intellectual integrity.

29 Thomas Cottier, John H. Jackson, and Rosa Lastra (eds), *International Law in Financial Regulation and Monetary Affairs* (Oxford: Oxford University Press, 2012).